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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1256

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner has filed what it terms a reply brief to the brief of Respondent, in which certain new matter is injected, and to which this supplemental brief is a response [Rule 24(5)]. In the main, the new matter thus injected is the same as that presented by Koehring to the Court of Appeals and it could and should have been presented, if relied upon, in the petition for writ of certiorari. The following answers to the new matter are submitted:

I

Petitioner argues that issues other than that of transfer-jurisdiction were presented to this Supreme Court on the former review of the jurisdictional question because, it is said, Hyde itself "presented to this Court the issues it now contends were not discussed or decided by this Court." In our reply brief in the Court of Appeals we said and now repeat:

Koehring argues that the United States Supreme Court has decided everything. This claim is made despite the fact that the single question stated in the petition for certiorari was that of the effect of an "instanter-transfer" order of the Fifth Circuit. It is argued that Hyde's petition for rehearing "broadened the scope of the Supreme Court's review." No authority is cited for this novel contention. The issues outside of the "transfer" point were expressly *not* raised. The petition stated, for example (R. 174):

> ". . . We do not ask this Court to pass upon those important questions which were before the Court of Appeals and which remain unresolved by that Court. We would not conceive this to be appropriate or in conformity with precedent or established appellate practice, or the statutory scheme designed to relieve the litigation load of this Court by providing for appellate functions in the Court of Appeal."

II

Next Petitioner says that Koehring did not reject the Federal forum because it filed an action in the Oklahoma Federal Court on a matter arising out of the same transaction. But this was a Miller Act suit for the purchase price of the large concrete plant and the law was and is so well settled against coverage of such claims by the Miller Act that the suit was promptly dismissed for want of jurisdiction

over the parties and subject matter.[1] It remains only to be added that Koehring sought no declaratory judgment in that action to determine its liability to Hyde for breach of the contract involved. Even had it done so, this would not have divested the State Court of jurisdiction over the *in personam* aspects of the controversy. The opinion of the Court of Appeals took note of the filing and dismissal of this spurious Miller Act complaint (388 F.2d at 503).

III

Petitioner then argues that there was no election not to remove the State Court action to the Federal Court because it relied upon alleged representations of Hyde's counsel. This statement is completely false[2] and has absolutely no support in the record. Koehring's reference to "(R. 150-152)" finds nothing more than a bare unverified allegation in Paragraph VII of Koehring's counterclaim pleading in the District Court, which allegation is categorically denied in the Answer thereto (R. 154).

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1. In this case, Cause No. 5236 in the United States District Court for the Northern District of Oklahoma, Judge Bohanan wrote in his conclusions of law dismissing the action that: "The Court further holds that the claims asserted by the plaintiff against the defendants do not fall within the purview of the Miller Act, and the Court therefore does not have and never did have jurisdiction of the subject matter of this case."

2. There was presented to the Court of Appeals an exchange of correspondence between counsel which demonstrated beyond question that the delay in filing Koehring's answer (not any petition for removal) was the result of an agreement for the accommodation of Koehring's local counsel. It was shown that the only agreement was that no answer need be filed in the State Court action pending further notice from Hyde's counsel. Such notice was given on December 5, 1962, and pursuant thereto Koehring filed an answer and general appearance without objection, and this was done seven and one half months prior to the decision of the interlocutory appeal by the Fifth Circuit.

This same argument, dehors the record, was made below and was resolved by the Court of Appeals with the statement in its opinion that:

> "Koehring did not seek to remove this action to the Federal Court."
> (388 F.2d at 503)

IV

It is argued that Petitioner defended itself in the Mississippi State Court action because it saw no other choice. If this be true, it is only because it did not wish to see. Actually, it chose to pursue its contentions in first one court and then another, and to shift at will whenever a favorable decision was not immediately forthcoming. One such shift was to obtain the stop order in the Oklahoma District Court on March 14 because it did not like the proceed order of the State Court received on March 10.[3]

Koehring chose to proceed in both courts in the hope of availing itself of the most favorable result.[4] It is too late now, we submit, after Koehring has fully participated

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3. This resulted from a hearing which Koehring itself initiated when no restraining order was outstanding from any court.

4. Even now Koehring continues to play both hands. Note that the Order directing re-trial in Oklahoma provides that "Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein." (R. 163, par. 1). In authoring this ingenious decree, Koehring has sought to build in for itself insurance against the possibility that a judgment in Oklahoma on a re-trial might *exceed* the one rendered by the State Court, where Koehring was successful in eliminating one large segment of damages claimed in the suit and on which proof was held to have been deficient; and also against the possibility that the ad damnum clause might be expanded on new proof of damages. The item of damages eliminated was for "winter protection" of the concrete in place, amounting to $51,733.71, which was disallowed by the Supreme Court on Koehring's appeal. See 178 So.2d 854.

in the State Court proceedings to launch a collateral attack on the final State Court judgment which resulted from those proceedings. Had it entirely won its case in the State Court, its present contention that the State Court was not privileged to proceed would be inaudible.

The Court of Appeals stated in its opinion:

> ". . . The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed. Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. . . ."
>
> (388 F.2d at 510)

V

Finally, Petitioner says that Respondent questions why it did not file a petition for certiorari from the Mississippi Supreme Court's decision and suggests as a reason that this Supreme Court of the United States had precedently rendered its decision on Petitioner's first petition for certiorari involving the transfer-jurisdictional question, and that Petitioner interpreted this Court's decision to mean that the Oklahoma Federal Court's decision had been affirmed.

In this connection it is a matter of controlling significance that the decision of this Court in the case styled *Koehring Company* v. *Hyde Construction Company, Inc.*,

382 U.S. 352, 86 S.Ct. 522, 15 L.Ed.2d 416, was called to the attention of the Supreme Court of Mississippi on the petition for rehearing in that court, and the court expressly held that the decision of the United States Supreme Court referred to did not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree in question. See *Koehring Company* v. *Hyde Construction Company, Inc.*, (Miss. 1966), 182 So.2d 580, the Court concluding as follows:

> "During the pendency of the suggestions of error, the United States Supreme Court, in an opinion delivered January 17, 1966, in 86 S.Ct. 522, styled Koehring Co. v. Hyde Construction Co., Inc., reversed the decision of the United States Circuit Court of Appeals, 10th Circuit, reported as Hyde Construction Company v. Koehring Company, 348 F.2d 643 (10th Cir. 1965), and held that the United States District Court for the Northern District of Oklahoma had acquired jurisdiction in that case on March 11, 1964.
>
> "As we read the January 17, 1966, decision of the United States Supreme Court, referred to above, it does not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree affirmed by this Court."

The question of whether the Supreme Court of Mississippi mis-applied or mis-read the decision of this Court in *Koehring Company* v. *Hyde Construction Company, Inc.*, supra, was also a Federal question, voluntarily submitted by Koehring to the State Supreme Court, which if erroneously decided, was itself equally subject to review only by the Supreme Court of the United States on petition for the writ of certiorari. [Cf. Rule 19(1)(b)].

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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